

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SAMUEL M. ROBERTS,

Plaintiff,

-vs.-

Civil No. 11 CV 6206L

LOS ALAMOS NATIONAL SECURITY, LLC.,
AWE, PLC., MASSACHUSETTS INSTITUTE OF
TECHNOLOGY,

Defendants,
Third-Party Plaintiffs,

-vs.-

UNIVERSITY OF ROCHESTER

Third-Party Defendant.

**DECLARATION OF LOUIS J. MICCA IN FURTHER SUPPORT OF PLAINTIFF'S
MOTION TO STRIKE THE ANSWER OF LOS ALAMOS**

Louis J. Micca, pursuant to 28 USC § 1746, declares under penalty of perjury that the foregoing is true and correct:

1. I am an attorney duly admitted to practice before this Court and am attorney for the Plaintiff, Samuel M. Roberts.

2. I make this declaration in further support of Plaintiff's motion to strike the answer of Los Alamos National Security, LLC ("Los Alamos") as the result of its persistent refusal to produce documentary discovery in this matter.

3. On January 22, 2014, I received a letter from counsel for Los Alamos together with a CD containing over 10,500 pages of documents produced by Los Alamos in this action. This production of documentary evidence was provided nearly one year after Plaintiff's demands

for production and more than five months after Magistrate Judge Feldman granted Plaintiff's discovery motion and ordered Los Alamos to produce all requested documents. A copy of the letter of Los Alamos' counsel, dated January 18, 2013, transmitting the CD is annexed as Exhibit 28. The contents of the CD are annexed as Exhibit 29.

4. All of the documents withheld by Los Alamos are responsive to Plaintiff's demands and some are highly relevant to the central issue raised in the competing motions for summary judgment, to wit: whether Principal Investigators owed Plaintiff a duty of care.

5. The essence of Los Alamos' defense to plaintiff's action is its assertion that it owed no duty to the Plaintiff despite its role as lead Principal Investigator for the series of experiments being conducted when Plaintiff was injured. In support of its motion for Summary Judgment, Los Alamos submitted the affidavit of Dr. Hans Herrmann in which he stated:

“... under the rules of the LLE, neither myself or any member of my team at [Los Alamos] could exercise *any direction or control over the LLE or its activities or employees, including the light pipe* and Mr. Roberts.” See Docket number 66-2, paragraph 15. (emphasis added)

6. The documents just produced by Los Alamos reveal the contrary. Specifically, Los Alamos has now produced an email exchange, dated July 24, 2008 (just two weeks before the accident), between Dr. Herrmann, Los Alamos' Lead Principal Investigator, Dr. Glebov, U of R's co-principal investigator and Dr. Horsfield, AWE's co-principal investigator. In the email exchange, Dr. Herrmann discussed the use of the Light Pipe proposed by Los Alamos for the upcoming experiment. Dr. Herrmann wrote to Dr. Glebov:

“We would like to run the light pipe with CO2 ... like we did last year. I expect Colin [Dr. Colin Horsfield of AWE] to be interacting with you on this again.” (emphasis added)

Dr. Glebov responded:

“I am not sure that the Light Pipe will be available for [Dr. Horsfeld]. Mike want [sic] to use Light Pipe with lead glass instead of CO₂ to study neutron Cherenkov signal. I want to test CO₂ maximum sensitivity...”

Dr. Herrmann then emailed Dr. Horsfield of AWE and Joe Mack, another Los Alamos employee:

“Mike & Vladimir [Dr. Glebov] have plans to use the Light Pipe on Aug 6 for purposes that may conflict with our [Los Alamos’] needs ... *Am I wrong to assume that as P[rincipal] I[nvestigator] I can dictate diagnostic configurations?*” (emphasis added)

A copy of the email exchange, bates stamped LANS 1915, is annexed as Exhibit 30.

7. This email exchange proves that Dr. Herrmann, the lead Principal Investigator, knew he had the authority to overrule co-principal investigator, Dr. Glebov, of the U of R, and dictate how the Light Pipe would be used during Los Alamos’ experiments to be conducted on August 6, 2008. This evidence stands in stark contrast to Dr. Herrmann’s affidavit swearing that he had no control over the U of R Laser Lab or the Light Pipe.

8. The withheld documents also include an intra-office email exchange between senior Los Alamos scientists, Terry C. Wallace, Jr., the Principal Associate Director of Science, Technology & Engineering and Susan J. Seestrom, the Associate Director for Experimental Physical Sciences. In the email exchange, Mr. Wallace states:

“*we have not been honest about the lanl [Los Alamos] involvement in the experiment. Was it really a joint experiment? The report in all past communications state that lanl was on site, but not part of the experiment. If we were part of the experiment we better be much more forth coming than we have been. I don’t doubt that no one from lanl did anything wrong, but if we are co-directing, then we better have taken that responsibility on.*” (emphasis added)

Ms. Seestrom responded:

“I would say we have been honest, *but maybe not either complete or clear.* I would say we probably relied on LLE for review of the safety aspects of the overall experiment and this diagnostic [the Light Pipe] specifically. I think the LLNL [Lawrence Livermore] work on the diagnostic was shoddy and probably

led to the event. *Finally – I would like to think we ought to have a role in making sure these things are done right if we are PI – and we did not.*”

A copy of the email exchange, bates stamped LANS 445, is annexed as Exhibit 31.

9. This email exchange reveals the lack of honesty on Los Alamos’ part following the commencement of this action. More importantly this exchange is Los Alamos’ acknowledgment of its duty and responsibility to review “the safety aspects of the overall experiment and this diagnostic specifically” as part of its role as lead Principal Investigator.

10. As a result of its failure to produce responsive documents including documents that are highly relevant to the summary judgment motions now before the Court, Los Alamos is in contempt of court and in violation of Rule 34 of the Federal Rules of Civil Procedure and the Order of Magistrate Judge Feldman. Given the protracted and unlawful refusal of Los Alamos to provide document discovery while attempting to seek summary judgment with affidavits contradicted by their own withheld emails, Plaintiff respectfully requests that the Court strike Los Alamos’ answer to Plaintiff’s complaint and award judgment in favor of Plaintiff and against Los Alamos on the issue of liability.

DATED: Pittsford, New York
 January 29, 2013

s/Louis J. Micca
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I caused to be filed the foregoing Declaration of Louis J. Micca dated January 29, 2013, with the Clerk of the District Court using the CM/ECF system, which sent notification to attorneys for:

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s/Louis J. Micca

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